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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 184

FLOYD DINAN, MILTON POPLEES, FRANK CASTELUCCI, FRANK POPLEES a/k/a FRANK DAY and ALBERT BRICKER,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT OF WESTCHESTER COUNTY, STATE OF NEW YORK.

PETITIONERS' REPLY BRIEF

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The respondent's brief in opposition to the petition herein has taken the position that the decision of this court in *Benanti* v. *U. S.*, 355 U. S. 96, had no effect on the pre-existing non-exclusionary rule of evidence in New York State, and the argument is advanced that the issue presented has been unequivocally settled.

On the other hand, it was argued in petitioners' application for a writ that by virtue of the decision in *Benanti*, the Federal-State relationship was due for review and

re-examination, and that this court should grant a Writ of Certiorari to resolve confusion and disagreement as to the scope and effect of the Federal Communications Act insofar as the same affects the exclusionary rule of evidence prevailing in the State of New York.

Illustrative of the confusion which the *Benanti* decision has engendered, is a recent opinion by the Court of Appeals of the State of New York which has been published since the submission of the petition herein. The case is *People* v. *Broady*, 5 N. Y. 2nd, 500. The majority opinion in the said case professes to find that the *Benanti* case did not rule that a State legislature could not pass parallel legislation in the field of intrastate communications. On the other hand, Judge Fuld, in a dissenting opinion, frankly expressed bewilderment as to the scope and intent of the rule in the *Benanti* case. We quote from the opinion of Judge Fuld:

> "The Supreme Court declared in the Benanti case that the Federal Communications Act is 'a comprehensive scheme' (355 U. S. 96, 78 S. Ct. 159) for the regulation of both interstate and intrastate communications and, in addition, intimated that Congress, by enacting that statute, 'and Section 605 in particular,' has exercised its power to forbid wire tapping and prevent a State from authorizing wire tapping even in the exercise of its legitimate police functions. Benanti v. United States, 355 U. S. 96, 104, 78 S. Ct. 155. Such language, particularly when considered in light of the authorities cited (355 U. S. at page 106, 78 S. Ct. 155)—such as Pennsylvania v. Nelson, 350 U. S. 497, 76 S. Ct. 477, and Hill v. Florida, 325 U. S. 538, 65 S. Ct. 1373, 89 L. Ed 1782—gives me pause as to the correctness of the present holding that the Federal Government has not fully occupied the field of telephonic communications, including, of course, their interception. And, if Congress 'has taken the particular subject-matter in hand' (Charleston & W.

Car. R. R. v. Varnville Furniture Co., 237 U. S. 597, 604, 35 S. Ct. 715, 59 L. Ed. 1137), it matters not, contrary to the intimations contained in the court's opinion, 350 U. S. at pages 509, 512, 76 S. Ct. at pages 483-485, whether the State legislation is in conflict with the Federal law or supplements it. See, e.g., Pennsylvania v. Nelson, 350 U. S. 497, 504, 76 S. Ct. 477, supra; Southern Ry. Co. v. Railroad Comm., 236 U. S. 439, 448, 35 S. Ct. 304, 59 L. Ed. 661; Erie R. R. Co. v. New York, 233 U. S. 671, 683, 34 S. Ct. 756, 58 L. Ed. 1149, reversing 198 N. Y. 369, 381, 91 N. E. 849, 853, 29 L.R.A., N. S., 240. Nevertheless, *until the Supreme Court has spoken more decisively on the subject*, I hesitate to say that Congress has, through Section 605, pre-empted the field so as to supersede and render ineffectual the provisions of this State's Constitution and Code of Criminal Procedure which authorize wire tapping (N. Y. Const., art. 1, § 12; Code Crim. Proc., § 813-a)." (Emphasis supplied.)

It is respectfully submitted that in the interests of clarification, this court should grant the petition for a Writ of Certiorari herein to the end that the Federal-State relationship on the question presented may be resolved.

Dated: September 29, 1959.

Respectfully submitted,

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